PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022, 4044, and 4062

RIN 1212-AB27

Benefit Payments and Allocation of Assets

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule makes changes to PBGC's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans. The changes make clarifications and codify policies involving payment of lump sums, changes to benefit form, and valuation of plan assets.

DATES: *Effective date.* This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Applicability date. The amendments under this final rule apply to plan terminations initiated on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. However, most of the amendments codify policies and practices that PBGC has followed for many years, and PBGC will continue to follow those policies and practices in the interim.

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SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose and authority

This final rule amends PBGC's regulations on benefit payments, allocation of assets, and termination liability to increase transparency of PBGC benefits administration, clarify and simplify language, increase flexibility, codify practices, and harmonize regulatory provisions with statutory provisions.

Legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, section 4022 of ERISA (Single-Employer Plan Benefits Guaranteed), section 4044 of ERISA (Allocation of Assets), and section 4062 of ERISA (Liability For Termination of Single-Employer Plans Under a Distress Termination or a Termination by Corporation).

Major provisions

This final rule:

Clarifies that PBGC's rules on payment of a lump sum are unaffected by election of a lump-sum distribution before plan termination.

Changes wording that refers to the current statutory dollar amount subject to cashout ($5,000) to instead refer to the statutory provision that specifies the maximum dollar amount.

Clarifies that a de minimis benefit of a married participant who dies after plan termination will be paid as an amount due a decedent, not as a qualified preretirement survivor annuity.

Clarifies that benefits will be paid to estates only as lump sums.

Clarifies that accumulated mandatory employee contributions may not be withdrawn if benefits are in pay status when a plan becomes trusteed.

Clarifies that the form of benefit in pay status when a plan becomes trusteed will not be changed.

Requires that fair market value or fair value, as appropriate, be used for purposes of valuing assets to be allocated to participants' benefits and in determining employer liability and net worth.

Background

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector defined benefit pension plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA): a single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. This final rule deals only with single-employer plans. Covered plans that are underfunded may terminate either in a distress termination under section 4041(c) of ERISA or in an involuntary termination (one initiated by PBGC) under section 4042 of ERISA. When such a plan terminates, PBGC typically is appointed statutory trustee of the plan, and becomes responsible for paying benefits in accordance with the provisions of title IV.

The amount of benefits paid by PBGC under a terminated trusteed plan is determined by several factors. The starting point is the plan — PBGC pays only those benefits that the plan provides under the plan's terms. Thus, PBGC begins by determining each participant's accrued plan benefit.

After PBGC determines the amount of the participant's plan benefit, PBGC determines the amount it can guarantee. There are limitations on the benefits that PBGC can guarantee. One limitation, under sections 4001(a)(8) and 4022(a) of ERISA, is that PBGC guarantees only those benefits that are "nonforfeitable." For purposes of title IV, a benefit is nonforfeitable if the participant had satisfied the plan's (or ERISA's) requirements for the benefit by the plan's termination date (or, if applicable, by the bankruptcy filing date of a contributing plan sponsor).[1]

Another limitation is the "maximum guaranteeable benefit" rule set forth in section 4022(b)(3) of ERISA, which caps the amount that PBGC can guarantee. The cap for a participant in a plan with a termination date in 2023 (or, if applicable, a bankruptcy filing date of a contributing sponsor in 2023), who retires at age 65 under a straight-life annuity, is $6,750.00

[1] *See* 29 CFR 4022.3(a)(1). For a plan that terminates while a contributing sponsor is the subject of a bankruptcy or other insolvency proceeding, the petition or filing date of the proceeding is treated as the plan's termination date for purposes of the guarantee rules. *See* section 4022(g) of ERISA and 29 CFR 4022.3(b). *See also* section 404 of the Pension Protection Act of 2006, P.L. 109-280 (Aug. 17, 2006).

per month. PBGC's guarantee is further limited by the "phase-in" rule, under which PBGC's guarantee of benefit increases during the 5-year period ending on the plan's termination date (or, if applicable, the bankruptcy filing date of a contributing sponsor) is phased in at the number of years the benefit increase has been in effect, multiplied by the greater of: (1) 20 percent of the amount of the benefit increase; or (2) $20 per month.[2] The "phase-in" rule protects the title IV insurance program from losses when the sponsor of an underfunded pension plan increases benefits shortly before the plan terminates. Another limitation, the accrued-at-normal limitation, is equal to the dollar amount of a participant's benefit in the straight life annuity form at normal retirement age. The portion that exceeds this limitation is not a PBGC guaranteeable benefit.

In some cases, a participant may receive more than the participant's guaranteed benefit, depending on the allocation of the plan's assets under section 4044(a) of ERISA or the allocation of PBGC's recoveries under section 4022(c) of ERISA, or both. Title IV directs PBGC to allocate the assets of a terminated pension plan among the participants and beneficiaries of the plan in the order of six priority categories. Section 4044(a) gives highest priority to benefits derived from participants' own voluntary and mandatory contributions (priority categories 1 and 2, respectively), next highest to benefits of certain retirees or persons who were or could have been in pay status 3 years before the plan terminated based on the lowest annuity benefit payable under the plan provisions at any time during the 5-year period ending on the termination date (priority category 3),[3] then to benefits guaranteed by PBGC (priority category 4), and last to nonguaranteed benefits (priority categories 5 and 6). PBGC allocates assets to benefits in priority category 3 — some of which may not be guaranteed — before guaranteed benefits in priority category 4. So, if a terminated plan's assets are sufficient to cover all benefits in priority

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[2] *See* section 4022(b)(1), (b)(7), and (g) of ERISA.

[3] For a plan that terminates while a contributing sponsor is the subject of a bankruptcy or other insolvency proceeding, the 3-year and 5-year lookbacks under priority category 3 are based on the bankruptcy filing date of the sponsor rather than the plan's termination date. *See* section 4044(e) of ERISA.

category 3, PBGC will pay those benefits using the plan's assets, regardless of whether they are guaranteed.

PBGC values the benefits in each of a terminated plan's six priority categories and values the terminated plan's assets. PBGC values both benefits and plan assets as of the termination date. After PBGC values the plan benefits and assets, the assets are allocated to the priority categories, beginning with priority category 1, either until all benefits in all categories have been covered or until the assets are insufficient to pay all benefits within a category.

In determining a participant's PBGC-payable benefit under title IV of ERISA, PBGC takes into account any partial plan distribution (whether a lump sum or an annuity purchase) that the plan made to the participant before plan trusteeship. PBGC offsets the benefit payable under title IV by the amount of the earlier distribution. This includes accounting for the distribution in determining the participant's maximum guaranteeable benefit (i.e., the maximum benefit that PBGC can guarantee by law, based on, among other things, the plan's termination date (or, if applicable, bankruptcy filing date of the contributing sponsor), the participant's age, and the participant's form of benefit). PBGC reduces the amount otherwise guaranteed because a participant in receipt of a partial plan distribution is effectively receiving each month a portion of the participant's plan benefits (even if the distribution was paid as a lump sum). Likewise, PBGC accounts for the earlier distribution in assigning a participant's benefit to the priority categories under section 4044(a) of ERISA. PBGC treats the amount paid as in the highest priority category in which the participant has benefits, because the participant has already received the distribution (or is receiving it as a separate annuity from an insurer).

PBGC prescribes the forms of benefit under which payment may be made. For a participant or beneficiary receiving an annuity benefit from the plan at the time PBGC becomes trustee of the plan, PBGC generally continues payment in the form being paid. For participants not yet in pay status, PBGC provides the plan's automatic forms for married and unmarried participants and a menu of optional PBGC annuity forms. Except in very limited circumstances, PBGC pays benefits as annuities, not single lump sums. One exception is where the total value of the participant's benefit is de minimis — i.e., $5,000 or less under current PBGC regulations. Another exception is where a portion of the participant's benefit is attributable to mandatory employee contributions. In this case, PBGC allows a participant to elect a return of the participant's accumulated mandatory employee contributions in a lump sum.

A participant or beneficiary in pay status in almost all circumstances cannot change an elected form of benefit after PBGC becomes plan trustee. This rule is consistent with the practices of most ongoing plans and prevents adverse selection (for example, by allowing a participant to choose a single-life form after the participant's spouse dies) and increased actuarial costs. PBGC has applied this rule both to participants and beneficiaries who went into pay status after PBGC became trustee and to participants and beneficiaries who were in pay status at the time PBGC became trustee and who later requested a change in benefit form from PBGC.

When an underfunded title IV-covered plan terminates, a claim arises in favor of PBGC and against the former sponsor and its controlled group for the difference between the plan's benefit liabilities and its assets. PBGC determines this claim for the amount of unfunded benefit liabilities as of the termination date which accrues interest from that date.[4] ERISA directs PBGC to collect any portion of this claim that exceeds 30 percent of the collective net worth of the former sponsor and its controlled group under commercially reasonable terms.[5] PBGC calculates its claim for unfunded benefit liabilities consistently with its determination of assets and benefit liabilities for purposes of the asset allocation under section 4044(a).

Proposed Rule

PBGC's regulations on Benefits Payable in Terminated Single-Employer Plans, 29 CFR part 4022, Allocation of Assets in Single-Employer Plans, 29 CFR part 4044, and Liability for Termination of Single-Employer Plans, 29 CFR part 4062, govern the areas discussed above. In

[4] *See* sections 4001(a)(18) and 4062(b)(1) of ERISA.
[5] *See* section 4062(b)(2) of ERISA.

the course of PBGC's regulatory review, PBGC identified opportunities to improve benefits administration by making it more transparent — filling in gaps where guidance is needed, simplifying or removing language, codifying policies, and applying consistency in asset valuation.

On September 30, 2019 (at 84 FR 51494), PBGC published a proposed rule to amend these three regulations and received comments from three commenters on the proposed rule. The commenters appreciated many of PBGC's clarifications but made suggestions for alterations to the proposed changes to PBGC's benefit payments regulation. The comments, PBGC's responses, and the provisions of this final rule are discussed below. The final rule does not include the proposed amendments to § 4022.23 of the benefit payments regulation and § 4044.10 of the asset allocation regulation dealing with partial plan distributions. PBGC is reviewing these provisions in light of comments on the proposed rule. Except for these omissions, a change to the amendment to § 4022.9 on benefit corrections, and some technical and editorial changes, the final rule is substantially the same as the proposed rule.

Final Regulatory Changes

General prohibition of lump sums

Payments of lump sums at or soon before plan termination raise concerns about abuse of the insurance program. For example, a lump-sum payment reduces the amount of assets in an underfunded plan that could be allocated to the benefits of other participants who may have benefits in higher priority categories, or that could fund guaranteed benefits. Thus, payment of such a lump sum could adversely affect other participants or PBGC.[6] As noted above, PBGC does not pay benefits in a lump sum except in certain limited circumstances (e.g., de minimis benefits). Section 4022.7(a) of the benefit payments regulation currently provides that "[i]f a

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[6] As an indication that Congress was concerned about lump sums affecting other participants, section 4045 of ERISA authorizes PBGC to recover a portion of a lump sum made before plan termination. The statute allows PBGC to recover, for payments made within the 3-year period immediately before termination, the amount which exceeds the present value of the guaranteed benefit that the participant would have received if the participant had elected to receive the benefit as an annuity.

benefit that is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid as such," but PBGC will guarantee the annuity equivalent.

Some have suggested that the prohibition on lump-sum payments does not apply to a participant who elected a lump sum before plan termination.[7] To remove any ambiguity in the regulation, the final rule, like the proposed, amends § 4022.7(a) of the benefit payments regulation to make explicit (and consistent with PBGC's practice) that the prohibition on lump sums includes an optional lump sum elected under the plan by the participant but not paid before plan trusteeship. This rule applies regardless of the reason for not paying the lump sum.

PBGC received two comments on this provision. One commenter agreed with the provision but suggested a technical change to § 4022.7(a) to clarify the language describing the alternative benefit that PBGC will guarantee. PBGC agrees that a technical change is needed. In the final rule, new § 4022.7(a) provides that PBGC will guarantee the alternative benefit, if any, in the plan which provides for the payment of equal periodic installments for the life of the recipient. If the plan does not provide such an annuity, PBGC will guarantee an actuarially equivalent life annuity.

A second commenter appreciated PBGC's clarification but disagreed that payment of a lump sum elected before plan termination should be based on the plan's payment process. The commenter stated that this could cause one participant to be paid and another not to be paid, citing examples such as shortages of administrative personnel due to the employer's liquidation or financial problems, data issues, and the need to perform calculations under a qualified domestic relations order.

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[7] *See, e.g., Fisher v. PBGC*, 151 F. Supp. 3d 159 (D.D.C. 2016), following remand to PBGC, 468 F. Supp. 3d 7 (D.D.C. 2020), aff'd, 994 F.3d 664 (D.C. Cir. 2021) (involving a participant who sued PBGC to challenge its denial of his request for a lump-sum distribution, originally made to the plan. PBGC denied the participant's request, and the district court sided with PBGC. On appeal, the D.C. Circuit affirmed, holding that PBGC's regulation governing lump-sum distributions is a permissible statutory interpretation under applicable law and that PBGC's determination was not arbitrary and capricious).

PBGC's prohibition on paying lump sums, including an optional lump sum elected under the plan by the participant but not paid before plan trusteeship, provides a bright-line test that PBGC is able to administer consistently among all of its trusteed plans. The rule is consistent with the approach provided under ERISA for distress terminations. Section 4041(c)(3)(D) of ERISA provides that beginning on the date on which the plan administrator provides a notice of distress termination to PBGC, the statutory requirements for approval of the termination will be met only if the plan administrator "pays benefits attributable to employer contributions . . . only in the form of an annuity . . . ". PBGC recognizes that a plan's payment process may cause some optional lump-sum payments to be made and not others, but for PBGC to determine whether a lump-sum payment could have been made before plan trusteeship would require a facts and circumstances analysis. Such review would be administratively burdensome and, depending on plan records, could still result in some optional lump-sum payments being made and not others. In addition, as explained above, the rule preserves assets that could be allocated to the benefits of other participants who may have benefits in higher priority categories, or that could fund guaranteed benefits. Accordingly, in the final rule, PBGC adopts the provision as proposed with the technical change described above.

As in the proposed rule, this change does not affect the payment of benefits in a lump sum in the circumstances permitted under § 4022.7(b) and (c) of the benefit payments regulation.

De minimis threshold

Section 203(e)(1) of ERISA and section 411(a)(11)(A) of the Internal Revenue Code (Code) provide a threshold (i.e., maximum present value of a benefit) that a pension plan may pay in a mandatory lump-sum distribution. From 1997 through 2023, that maximum was $5,000.[8] After 2023, it will be $7,000.[9] PBGC's benefit payments regulation contains three

[8] The Taxpayer Relief Act of 1997 increased the maximum from $3,500 to $5,000 effective for plan years beginning after August 5, 1997.

[9] Section 304 of the SECURE 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, P.L. 117-328 (Dec. 29, 2022).

provisions that refer to this threshold, and the regulation was amended after the statutory amount increased to $5,000.[10] To avoid amending the regulation each time Congress changes the threshold for mandatory lump-sum distributions, the final rule, like the proposed, amends the three provisions so that they refer not to a set amount, but to the dollar amount specified under section 203(e)(1) of ERISA. As a result, for purposes of part 4022, the new $7,000 maximum automatically will apply to plan terminations after December 31, 2023.

The three provisions are §§ 4022.7(b)(1)(i) and (iii) and 4022.7(d)(1) of the current benefit payments regulation.

Deceased participants with de minimis benefits

Currently, § 4022.7(b)(1)(iii) of the benefit payments regulation provides that if (1) the lump-sum value of a qualified preretirement survivor annuity (QPSA) is $5,000 or less (after December 31, 2023, the value will be $7,000 or less), (2) the benefit is not yet in pay status, and (3) the participant dies after the termination date, then the surviving spouse may elect to receive the QPSA benefit as a lump sum or an annuity. Section 4022.7(b)(1)(iii) of the benefit payments regulation is silent about the lump-sum value of the participant's benefit, and the provision would appear to apply regardless, so long as the three conditions above are met. However, if the lump-sum value of the participant's benefit is de minimis as of the termination date under § 4022.7(b)(1)(i) of the benefit payments regulation and the participant dies after the termination date, PBGC's policy is to pay the benefit under the rules in subpart F of the benefit payments regulation (Certain Payments Owed Upon Death). Subpart F provides rules for the payment of benefits that may be owed to a deceased participant or beneficiary, such as the reimbursement of an earlier underpayment to the participant or beneficiary. PBGC treats de minimis benefits as due and owing as of the plan's termination date, because they are payable by PBGC at any time, regardless of the participant's age, and presumably most participants with de minimis benefits

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[10] *See* 63 FR 38305 (July 16, 1998).

would apply for an immediate lump sum if PBGC were able to notify them of its availability upon plan termination.

The final rule, like the proposed, amends § 4022.7(b)(1)(iii) of the benefit payments regulation to make clear that in the case of a participant with a de minimis benefit who dies after the plan's termination date and whose benefit is not yet in pay status, PBGC will treat the benefit as payable under subpart F. Furthermore, if a participant is married, PBGC will pay the full value of the participant's de minimis benefit to the surviving spouse (not limited to the value of a QPSA), with any interest owed. PBGC clarifies § 4022.93 of subpart F (Who will get the benefits PBGC may owe me at the time of my death?) by adding an exception to the current order of priority. New § 4022.93(d) provides that the surviving spouse of a participant with a benefit that does not exceed the dollar amount specified in section 203(e)(1) of ERISA, who dies after the termination date when the benefit is not yet in pay status, will receive the full value of the de minimis benefit of a deceased participant. This benefit will at times exceed the value of the QPSA.

Additionally, the final rule, like the proposed, clarifies the form of PBGC's payment to a surviving spouse where the participant has a non de minimis benefit. In new § 4022.7(b)(1)(iv), if the deceased participant's benefit exceeds the dollar amount specified in section 203(e)(1) of ERISA, but the lump-sum value of annuity payments under the QPSA does not exceed that amount, and the benefit is not in pay status, PBGC may pay the QPSA as a lump sum, or as an annuity, if available and elected by the surviving spouse. For example, if the value of the participant's benefit is $8,000 and the value of the QPSA is $4,000, PBGC will pay the QPSA value of $4,000 to the surviving spouse in a lump sum, or as an annuity, if available, and if elected by the surviving spouse. (By contrast, if the value of the participant's benefit is $4,000, PBGC would treat that amount as owed to the participant and pay the full $4,000 to the participant's beneficiary under subpart F of the benefit payments regulation.)

One commenter objected to this proposal. The commenter understood the reasoning for the proposal, that a de minimis benefit could have been cashed out had the participant made a benefit election before death but found it inequitable. The commenter noted that a spouse could be better off if the participant's benefit was below $5,000[11] because the spouse would not be limited to the QPSA amount. The commenter suggested three alternatives, which PBGC considered. The first alternative would pay under subpart F a benefit to the spouse based on the value of the QPSA in all cases. Compared to PBGC's approach, this alternative would pay a lesser benefit to a surviving spouse than to a non-spouse beneficiary.

The commenter's two other suggested alternatives ((1) pay the spouse $5,000 if the present value of the participant's benefit is between $5,000 and $10,000, and (2) pay the spouse $5,000 plus 25% of the amount that exceeds the $5,000 present value of the participant's benefit) would result in the anomaly of a benefit payment greater than what the participant's plan would have paid. For this reason, PBGC is not adopting these alternatives. PBGC provided examples in the preamble of the proposed rule showing the effect of the rules on the payment of benefits because it recognized that the difference in benefit payments for participant benefits at or below the $5,000 de minimis threshold and participant benefits between $5,000 and $10,000 could appear inequitable. However, PBGC believes its approach results in the most consistent administration of payment of benefits and addresses PBGC's inability to provide benefit information and election forms immediately following plan termination.

Payments to estates

PBGC may owe benefits to a deceased participant or beneficiary as of the date of death. For example, benefits may be owed if the estimated benefit that PBGC paid before the date of death was less than the final benefit that PBGC determines should have been paid. Or, as described above, the participant may have been owed a de minimis benefit. Subpart F of the

[11] The commenter's examples are based upon the pre-2024 dollar amount specified in section 203(e)(1) of ERISA.

benefit payments regulation identifies the recipient of benefits owed at death. One possible payee is the participant's or beneficiary's estate.[12]

Currently, § 4022.7(b)(1)(iv) of PBGC's benefit payments regulation provides for a lump-sum payment "if so elected by the estate." The typical alternative to a lump sum is a life annuity — and a life annuity is inappropriate for an estate.

Accordingly, the final rule, like the proposed, redesignates current § 4022.7(b)(1)(iv) as new § 4022.7(b)(1)(v) and eliminates the annuity election, so that lump-sum payment becomes automatic for an estate. The final rule clarifies that PBGC will always pay benefits owed to an estate, regardless of the de minimis threshold, in a lump sum, with no annuity option.

Accumulated mandatory employee contributions

The final rule, like the proposed, clarifies that if a participant is not in pay status at the time the plan becomes trusteed, the participant may withdraw any accumulated mandatory employee contributions (AMECs) in a single lump sum at any time before going into pay status, if the plan would have permitted such a withdrawal. But if a participant is in pay status at the time the plan becomes trusteed, PBGC will not allow the participant to change the participant's benefit and elect a withdrawal of AMECs.

Mandatory employee contributions (MECs) are contributions that are required as a condition of employment with the plan sponsor or of obtaining benefits under the plan attributable to employer contributions. AMECs are MECs credited with interest at a specified rate, as described under section 411(c)(2) of the Code. In general, AMECs provide for an employee-derived benefit and a preretirement death benefit. Some plans provide that participants may withdraw their AMECs before retirement.

For a terminated plan, section 4044(a)(2) of ERISA makes the portion of a participant's benefit derived from the participant's AMECs a priority category 2 benefit. Section 4022.7(b)(2) of PBGC's benefit payments regulation permits PBGC to pay AMECs in a lump sum if two

[12] *See* 29 CFR 4022.93(a).

conditions are met:[13] the participant elects payment of AMECs as a lump sum within 61 days after receiving notification that an election is available; and payment of AMECs as a lump sum is consistent with the plan's provisions.

The final rule, like the proposed, simplifies administration of the AMEC provisions by amending § 4022.7(b)(2)(i) to remove the 61-day limit.

Although plans typically offer only a lump-sum return of AMECs, § 4022.7(b)(2)(i) of the benefit payments regulation allows a participant to withdraw AMECs not just in a single lump sum, but in "a series of installments." Providing this treatment has administrative costs for PBGC, and the option has low value to participants. If a participant wishes to receive AMECs over time, the participant can elect to have AMECs increase the participant's monthly annuity benefit. PBGC sees no compelling reason for the regulation to continue including this separate option. The final rule, like the proposed, eliminates it.

Section 4022.7(b)(2)(ii) of the benefit payments regulation currently permits a participant who has already begun receiving from the plan an annuity that is partially derived from AMECs to elect a return of AMECs after plan termination. This provision is inconsistent with the general rule (discussed below under *Change in benefit form and benefit corrections*) that once a benefit is in pay status, no change is permitted. In practice, PBGC does not give a participant who was in pay status at the time the plan becomes trusteed the option of withdrawing AMECs after payments have begun. The final rule, like the proposed, clarifies that PBGC does not permit participants in pay status to elect to withdraw AMECs. The final rule amends § 4022.7(b)(2)(ii) to provide that if a participant is in pay status at the time the plan becomes trusteed,[14] PBGC will not allow the participant to withdraw any AMECs.

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[13] PBGC's regulation makes an exception for benefits attributable to a rollover from a defined contribution plan. Such rollovers are described in IRS's guidance on the purchase of additional benefits from a defined benefit plan. *See* IRS Rev. Rul. 2012-4. These benefits are generally treated as AMECs, but PBGC does not allow payment of them in a lump sum. *See* 29 CFR 4022.7(b)(2)(iii).

[14] Although ERISA provides only that PBGC "may" become the trustee (*see* section 4042(b)(1) of ERISA), in practice PBGC has been appointed trustee of almost every underfunded plan that has terminated since 1974, and for this reason PBGC's regulations assume PBGC trusteeship of an underfunded terminated plan.

Change in benefit form and benefit corrections

In almost all plans, changes in the form of payment after benefit commencement — for example, by allowing a participant to add or eliminate a survivor benefit or substitute one beneficiary for another — are not permitted. Such changes — made with information not available when benefit payments began — could result in increased actuarial costs to a plan. For example, a participant might, after starting a straight-life annuity, learn that the participant's health is failing and therefore wish to add a survivor benefit to continue payments after the participant's death.

Similarly, PBGC generally does not allow a participant to change an elected form of benefit after payments begin. Section 4022.8(d) of PBGC's current benefit payments regulation provides that "[o]nce payment of a benefit starts, the benefit form cannot be changed." However, § 4022.8(a) provides, "[t]his section applies where benefits are not already in pay status."

The regulation was intended to prevent changes in the form of a benefit commenced both before and after PBGC trusteeship.[15] To remove any doubt that the benefit form may not be changed once payment of a benefit begins (at any point in time), the final rule, like the proposed, amends § 4022.8(a) to remove the words "[t]his section applies where benefits are not already in pay status." In addition, new § 4022.8(d) provides that, subject to changes that PBGC may prescribe under § 4022.9(d), once payment of a benefit begins the form cannot be changed, regardless of whether PBGC or the plan put the participant into pay status.

Although PBGC does not generally allow a change in the benefit form after benefits begin, PBGC's existing policies recognize that sometimes errors are made in the benefit estimates it sends to participants and beneficiaries, which may result in benefit elections that would not have been made if more accurate estimates had been provided.

[15] The preamble to the final rule adopting § 4022.8 (67 FR 16950) explains that "[i]f a participant's benefit is already in pay status, PBGC continues to pay the benefit (subject to the limitations in title IV of ERISA) in the form being paid."

Under PBGC's policy, a change in the form of benefit is permitted in only two circumstances: (1) when PBGC erred by 10 percent or more in the relative value of optional forms when providing a benefit estimate (i.e., PBGC used incorrect form conversion factors), and (2) when PBGC erred by 10 percent or more in the early retirement factor used to provide a benefit estimate. An incorrect estimate may occur, for example, if PBGC later becomes aware of plan information affecting factors used by PBGC in calculating a benefit estimate.

Accordingly, in the final rule, as in the proposed, new § 4022.9(d) clarifies the circumstances in which PBGC would permit a change in form of benefit. New § 4022.9(d) provides that PBGC may prescribe the time and manner for correcting errors that affect benefit form and benefit starting dates. In addition, the final rule allows PBGC to prescribe the time and manner for changes in benefit form to mitigate the consequences of a Presidentially declared disaster that might be needed to enable participants to make valid benefit elections.

In the final rule, as in the proposed, current paragraph (d) of § 4022.9 becomes paragraph (e) of § 4022.9. In addition, the heading of § 4022.9 is revised to reflect the promulgation of paragraph (d) concerning prescribed benefit changes.

Valuation methodology

The final rule, like the proposed, amends PBGC's asset allocation regulation and its regulation on Liability for Termination of Single-Employer Plans (29 CFR part 4062) to apply fair market value or fair value, as appropriate, for purposes of allocating assets to participants' benefits and determining and collecting employer liability for plan underfunding.

When an underfunded pension plan terminates, PBGC must allocate the plan's assets among participants' benefits under section 4044 of ERISA, and it must determine the amount of the plan's unfunded benefit liabilities, i.e., the shortfall in assets to cover benefit liabilities, and collect it from the contributing sponsor and its controlled group under section 4062 of ERISA. PBGC's collection of the shortfall may depend on the amount of the shortfall and the net worth of the contributing sponsor and each member of its controlled group. Thus, it is necessary — in addition to valuing the plan's benefit liabilities — to value the plan's assets (to allocate to benefits and determine the shortfall) and the contributing sponsor's and controlled group members' net worth (to determine how PBGC is to collect the employer liability for the shortfall).

The statute does not explicitly require that these valuations be made in a consistent manner. It seems fair and reasonable, however, to use the same methodology to value plan assets for purposes of both allocating assets to benefits and determining the amount of unfunded benefit liabilities. It likewise seems fair and reasonable to use the same methodology for determining both employer liability and employer net worth.

The statute also does not specify the methodologies for valuing assets for purposes of allocating them to benefits among the priority categories or for determining employer net worth. For purposes of employer liability, section 4062(b)(1) of ERISA says that the liability is the plan's "unfunded benefit liabilities," which under section 4001(a)(18) of ERISA is to be determined using the "current value" of plan assets. "Current value" is not defined in title IV.

Current § 4044.41(b) of the asset allocation regulation provides that plan assets are to be valued for allocation purposes at their fair market value.[16] Likewise, § 4062.4(c) of the employer liability regulation provides that a person's net worth is equal to its fair market value. Section 4062.3 of the employer liability regulation simply repeats the statutory direction that employer liability equals the total amount of unfunded benefit liabilities. PBGC has in practice used fair market value for this purpose. Thus, the valuation methodology for allocation, employer liability, and net worth is consistent.

PBGC believes that the value of pension plan assets determined under a "fair value" framework may be considered a reasonable estimate of value for the same assets for purposes of satisfying the above fair market value requirements for allocating assets, determining employer

[16] Section 4001.2 of PBGC's regulation on Terminology defines "fair market value" as "the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."

liability, and calculating net worth of liable persons. This view is reflected in PBGC's plan asset valuation procedures. PBGC, therefore, currently applies a fair value methodology in some cases. These cases include, but are not limited to, those where PBGC cannot reasonably obtain the necessary data or inputs necessary to establish the fair market value, such as hedge funds, private equity funds and other hard-to-value assets.

The Financial Accounting Standards Board Accounting Standards Codification Section 820, *Fair Value Measurements and Disclosures* (ASC 820), establishes a framework for measuring fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP). Under PBGC's procedures, "hard-to-value" assets are generally Level 3 assets under the "fair value" hierarchy of ASC 820. Accordingly, to conform PBGC's regulations to current practice, PBGC has concluded that it is appropriate to adopt the valuation methodologies of fair market value as defined in § 4001.2 of PBGC's regulation on Terminology or fair value in accordance with U.S. GAAP, as appropriate, for purposes of allocating assets, determining employer liability, and calculating net worth of liable persons. The final rule, like the proposed, amends PBGC's asset allocation and employer liability regulations to achieve this result.

Compliance with Rulemaking Guidelines

Executive Orders 12866 and 13563

The Office of Management and Budget (OMB) has determined that this rule is not a "significant regulatory action" under Executive Order 12866. Accordingly, OMB has not reviewed the final rule under Executive Order 12866.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic and policy implications of this final rule and has concluded that there will be no significant economic impact as a result of the final amendments to PBGC's regulations. Most of the amendments merely codify existing PBGC policies and practices. Making these policies and practices more transparent may decrease uncertainty among those affected by PBGC benefit determinations, reducing the need for inquiries, consultations or appeals. The change to PBGC's regulation on valuation methodology should have no impact, because use of fair value instead of fair market value will not result in values that are regularly higher or lower; in other words, use of fair value may result in a slightly higher value in some cases and a slightly lower value in other cases.

Section 6 of Executive Order 13563 requires agencies to rethink existing regulations by periodically reviewing their regulatory program for rules that "may be outmoded, ineffective, insufficient, or excessively burdensome." These rules should be modified, streamlined, expanded, or repealed as appropriate. PBGC has identified the amendments to the regulations on benefit payments, allocation of assets, and liability for termination of single-employer plans as consistent with the principles for review under Executive Order 13563. PBGC believes the codification of policies on how benefits are paid provides clearer guidance to the public, and that the changes to the asset valuation rule streamline the valuation process and incorporate current actuarial best practices.

Regulatory Flexibility Act

The Regulatory Flexibility Act[17] imposes certain requirements respecting rules that are subject to the notice-and-comment requirements of section 553(b) of the Administrative Procedure Act, or any other law,[18] and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a final rule is not likely to

[17] 5 U.S.C. 601 et seq.
[18] The applicable definition of "rule" is found in section 601 of the Regulatory Flexibility Act. *See* 5 U.S.C. 601(2).

have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present a final regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.[19]

For purposes of the Regulatory Flexibility Act requirements with respect to this final regulation, PBGC considers a small entity to be a plan with fewer than 100 participants.[20] This is substantially the same criterion PBGC uses in other regulations[21] and is consistent with certain requirements in title I of ERISA[22] and the Code,[23] as well as the definition of a small entity that PBGC and the Department of Labor have used for purposes of the Regulatory Flexibility Act.[24]

Further, while some large employers that terminate plans may have small plans that terminate along with larger ones, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. PBGC therefore requested comments on the appropriateness of the size standard used in evaluating the impact of the amendments in the proposed rule on small entities. PBGC received no comments on this point.

Based on its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this final rule will not

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[19] The applicable definitions of "small business," "small organization," and "small governmental jurisdiction" are found in section 601 of the Regulatory Flexibility Act. *See* 5 U.S.C. 601.

[20] PBGC consulted with the Small Business Administration Office of Advocacy in making this determination as required by 5 U.S.C. 603(c). Memorandum received from the U.S. Small Business Administration, Office of Advocacy on March 9, 2021.

[21] *See, e.g.*, special rules for small plans under part 4007 (Payment of Premiums).

[22] *See, e.g.*, section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

[23] *See, e.g.*, section 430(g)(2)(B) of the Code, which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

[24] *See, e.g.,* PBGC's proposed rule on Reportable Events and Certain Other Notification Requirements, 78 FR 20039, 20057 (April 3, 2013) and DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

have a significant economic impact on a substantial number of small entities. All or virtually all of the effect of this final rule will be on PBGC or persons who receive benefits from PBGC. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

List of Subjects

29 CFR Part 4022

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

29 CFR Part 4044

Employee benefit plans, Pension insurance.

29 CFR Part 4062

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons given above, PBGC amends 29 CFR parts 4022, 4044, and 4062 as follows.

PART 4022 — BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. Amend § 4022.7 by:

a. Revising paragraphs (a) and (b);

b. In paragraph (c), removing the four instances of the words "single installment" and adding in their place the words "lump sum"; and

c. In paragraph (d)(1), removing the phrase "is $5,000 or less" and adding in its place "does not exceed the dollar amount specified in section 203(e)(1) of ERISA".

The revisions read as follows:

§ 4022.7 Benefits payable in a lump sum.

(a) *Alternative benefit.* Except as provided in this part, PBGC pays benefits only in annuity form. If a benefit that is guaranteed under this part is payable in a lump sum or substantially so under the terms of the plan, including an option elected under the plan by the participant before plan trusteeship, PBGC will not guarantee the benefit in such form. Instead, PBGC will guarantee the alternative benefit, if any, in the plan which provides for the payment of equal periodic installments for the life of the recipient. If the plan does not provide such an annuity, PBGC will guarantee an actuarially equivalent life annuity.

(b) *Payment by PBGC*--(1) *Payment in lump sum.* Notwithstanding paragraph (a) of this section:

(i) *In general.* If the lump-sum value of a benefit (or of an estimated benefit) payable by PBGC and calculated as of the termination date does not exceed the dollar amount specified in section 203(e)(1) of ERISA in effect as of the termination date and the benefit is not yet in pay status as of the date PBGC becomes trustee, the benefit (or estimated benefit) may be paid in a lump sum.

(ii) *Annuity option.* If PBGC would otherwise make a lump-sum payment in accordance with paragraph (b)(1)(i) of this section and the monthly benefit (or the estimated monthly benefit) is equal to or greater than $25 (at normal retirement age and in the normal form for an unmarried participant), PBGC will provide the option to receive the benefit in the form of an annuity.

(iii) *Deceased participants after plan termination*. If the lump-sum value of a participant's benefit calculated as of the termination date does not exceed the dollar amount specified in section 203(e)(1) of ERISA in effect as of the termination date, and the participant dies after the plan's termination date and before the benefit is in pay status, PBGC will treat the benefit as owed to the participant at the time of death and the rules in subpart F of this part apply.

(iv) *Payment of de minimis QPSA as lump sum or annuity*. If the lump-sum value of a participant's benefit calculated as of the termination date exceeds the dollar amount specified in section 203(e)(1) of ERISA in effect as of the termination date, the lump-sum value of annuity payments under the qualified preretirement survivor annuity (or under an estimated qualified preretirement survivor annuity) does not exceed that amount, and the participant dies after the plan's termination date and before the benefit is in pay status, then the qualified preretirement survivor annuity (or the estimated qualified preretirement survivor annuity) may be paid in a lump sum, or as an annuity, if available, and if elected by the surviving spouse.

(v) *Payments to estates.* PBGC will pay any annuity payments payable to an estate in a lump sum without regard to the threshold in paragraph (b)(1)(i) of this section. PBGC will discount the annuity payments using the Federal mid-term rate (as determined by the Secretary of the Treasury pursuant to section 1274(d)(1)(C)(ii) of the Code) applicable for the month the participant died based on monthly compounding.

(2) *Return of employee contributions*--(i) *In general.* Notwithstanding any other provision of this part, PBGC will pay as a lump sum instead of as an annuity, the value of the portion of an individual's basic-type benefit derived from accumulated mandatory employee contributions, if payment in a lump sum is consistent with the plan's provisions and if the individual elects such payment either before or at the time the individual starts receiving annuity payments from PBGC for the remainder of the individual's benefit. For purposes of this part, the portion of an individual's basic-type benefit derived from accumulated mandatory employee contributions is determined under § 4044.12 of this chapter (priority category 2 benefits), and the value of that portion is computed under the applicable rules contained in part 4044, subpart B of this chapter.

(ii) *Benefits in pay status.* If an individual is in pay status with an annuity as of the date the plan becomes trusteed, and if the individual did not elect to withdraw any accumulated mandatory employee contributions, PBGC will not allow the individual to withdraw any portion of the benefit derived from accumulated mandatory employee contributions as a lump sum.

*   *   *   *   *

3. In § 4022.8, amend paragraph (a) introductory text by removing the phrase "This section applies where benefits are not already in pay status." and by revising paragraph (d) to read as follows:

§ 4022.8 Form of payment.

* * * * *

(d) *Change in benefit form.* Subject to benefit changes that PBGC may prescribe under § 4022.9(d), once payment of a benefit starts, the benefit form cannot be changed, regardless of whether the participant or beneficiary was put into pay status by the plan before the date PBGC becomes trustee of the plan.

* * * * *

4. Amend § 4022.9 by:

a. Revising the section heading;

b. Redesignating paragraph (d) as paragraph (e); and

c. Adding new paragraph (d).

The revision and addition read as follows:

§ 4022.9 Time of payment; benefit applications and corrections.

* * * * *

(d) *Benefit corrections*. PBGC may prescribe the time and manner for corrections of errors that affect benefit form and benefit starting dates and for changes in benefit form to mitigate the consequences of a Presidentially declared disaster.

* * * * *

§ 4022.21 [Amended]

5. Amend paragraph (c)(1) by removing the words “single installment” and adding in their place the words “lump sum”.

6. Amend § 4022.93 by revising the section heading, paragraph (a) introductory text, and adding paragraph (d) to read as follows:

§ 4022.93. Who will get benefits PBGC may owe me at the time of my death?

(a) *In general.* Except as provided in paragraphs (b), (c), and (d) of this section, we will pay any benefits we owe you at the time of your death to the person(s) surviving you in the following order—

* * * * *

(d) *Lump-sum payments to surviving spouses.* For a deceased participant whose benefit under § 4022.7(b) has a lump-sum value not exceeding the dollar amount specified in section 203(e)(1) of ERISA, payment will be made to the surviving spouse (if any) if such spouse would otherwise be entitled to receive a qualified preretirement survivor annuity under section 205(a)(2) of ERISA, and the surviving spouse will receive highest priority under paragraph (a) of this section.

PART 4044 — ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

7. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

8. Amend § 4044.41 by revising paragraph (b) to read as follows:

§ 4044.41 General valuation rules.

* * * * *

(b) *Valuation of assets.* Plan assets generally will be valued at their fair market value as defined in § 4001.2 of this chapter. As appropriate, plan assets will be valued at their fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP).

PART 4062 — LIABILITY FOR TERMINATION OF SINGLE-EMPLOYER PLANS

9. The authority citation for part 4062 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1362-1364, 1367, 1368.

10. Amend § 4062.4 by revising paragraph (c) introductory text to read as follows:

§ 4062.4 Determinations of net worth and collective net worth.

*   *   *   *   *

(c) *Factors for determining net worth.* A person's net worth is to be determined on the basis of the factors set forth below in this section, to the extent relevant; different factors may be considered with respect to different portions of the person's operations. Generally, fair market value, as defined in § 4001.2 of this chapter, is to be used. As appropriate, fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP) is to be used.

Issued in Washington, DC.

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[FR Doc. 2023-14349 Filed: 7/10/2023 8:45 am; Publication Date: 7/11/2023]